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IN THE

Supreme Court of the United States

NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN-DRIVESHAFT, INC., and NTN-BCA CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a decision by an agency to change its policy in response to an adverse determination by the World Trade Organization requires a federal court to remand a case to allow that agency to implement its new policy in that case.

2. Whether an agency may use "facts otherwise available" with an adverse inference when calculating the antidumping duty payments for a company that cooperated to the best of its ability.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner, NTN Corporation, is a publicly-owned company with shares listed on the Tokyo Stock Exchange. It has no parent company and no publicly traded company owns 10% or more of its stock. Petitioners NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-Driveshaft, Inc., and NTN-BCA Corporation are wholly-owned by NTN USA Corporation, which itself is wholly-owned by NTN Corporation.

LIST OF PARTIES

All of the appellants below, other than the petitioners, have withdrawn from this action and are no longer interested parties. Timken U.S. Corporation, intervenor-defendant-appellee below, is also being served as a respondent.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 CORPORATE DISCLOSURE STATEMENT	ii
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vii
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	6
A. Background on Antidumping Proceedings	8
B. Commerce's "Zeroing" Practice	10
C. Commerce's Use of Adverse Facts Available	13
D. Litigation History	15
E. Parallel Proceedings and Commerce's Intervening Change in Policy	17

Contents

Page

REASONS FOR GRANTING THE PETITION 19

1. The Federal Circuit's Refusal to Remand Conflicts with the Decisions of the D.C. Circuit Remanding Agency Determinations After a Change in Policy 21

2. The Federal Circuit's Refusal to Remand Undermines the Executive Branch's Decision to Implement the WTO Decision in this Case 23

3. The Federal Circuit's Refusal to Remand Condones Commerce's Erroneous Application of "Facts Otherwise Available" with an Adverse Inference 26

CONCLUSION 30

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided March 7, 2007 ..... 1a

Appendix B — Opinion Of The United States Court Of International Trade Dated August 20, 2004 ..... 12a

Appendix C — Order Of The United States Court Of Appeals For The Federal Circuit Denying Petition For Rehearing Filed May 3, 2007 ..... 83a

Appendix D — Department Of Commerce Final Determination Dated August 30, 2002 .... 85a

Appendix E — Department Of Commerce Amended Final Determination Dated October 15, 2002 ..... 100a

Appendix F — Statement Of The United States Before WTO Dispute Settlement Body That It Intended To Implement The WTO's Decision On Zeroing In The Case Brought By Japan Dated February 20, 2007 ..... 105a

Appendix G — Agreement Dated May 8, 2007 That The Reasonable Period Of Time For The United States To Implement The WTO's Decision Is Eleven Months, Expiring On December 24, 2007 ..... 115a

Appendices

Page

Appendix H — Petition For Panel Rehearing Or To Stay Or Extend The Time To Issue The Mandate, Filed By Plaintiffs-Appellants NTN Corp., et al. Dated April 23, 2007 ..... 117a

Appendix I —Second Written Submission Of The United States, *United States—Section 129(c)(1) Of The Uruguay Round Agreements Act*, WT/DS221 Dated March 8, 2002, *available at* http://www.ustr.gov/assets/Trade_Agreements/Monotoring_Enforcement/Dispute_ Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file327_6455.pdf 130a

TABLE OF CITED AUTHORITIES

Page

CASES

Chr. Bjelland Seafoods A/S et al. v. United States,
19 C.I.T. 35 (Ct. Int'l Trade 1995) 10

Corus Staal BV v. Department of Commerce,
395 F.3d 1343 (Fed. Cir. 2005),
cert. denied, 126 S. Ct. 1023 (2006) 25

Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994) 26

Nippon Steel Corp. v. United States,
337 F.3d 1373 (Fed. Cir. 2003) 29-30

NLRB v. Food Store Employees Union,
417 U.S. 1 (1974) .....*passim*

NSK Ltd., et al. v. United States,
346 F.2d 1312 (2004) 15

NSK Ltd. et al. v. United States,
162 F. App'x 982, 2006 U.S. App.
LEXIS 1682 (Fed. Cir. 2006) 16

NSK Ltd. et al. v. United States,
481 F.3d 1355 (Fed. Cir. 2007) 16

NSK Ltd. et al. v. United States,
2007 U.S. App. LEXIS 11681
(Fed. Cir. 2007) 17

Page

Nucor Corp. v. United States,
414 F.2d 1331 (Fed. Cir. 2005) 29

Panhandle Eastern Pipe Line Co. v. FERC,
890 F.2d 435 (D.C.Cir.1989) 23

SKF USA, Inc. v. United States,
254 F.3d 1022 (Fed. Cir. 2001) 22

Williston Basin Interstate Pipeline Company v. FERC, 165 F.3d 54 (D.C. Cir. 1999) 23

Zenith Electronics Corporation v. United States, 77 F.3d 426
(Fed. Cir. 1996) 24

STATUTES AND REGULATIONS

19 U.S.C. § 1673 ..... 2, 8

19 U.S.C. § 1673(1) 8

19 U.S.C. § 1673(2) 8

19 U.S.C. § 1675(a) 9

19 U.S.C. § 1677(35) 3, 11

19 U.S.C. § 1677e(a) 4, 27, 29

19 U.S.C. § 1677e(b) 4, 28, 29

19 U.S.C. § 1677f-1(d) 11

Cited Authorities

Page

19 U.S.C. § 1677m(e) 6, 27

19 U.S.C. § 3533(g) 24

19 U.S.C. § 3538(b) 24

Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 20

19 C.F.R. § 351.308(a) 28

ADMINISTRATIVE DETERMINATIONS

Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom, 67 Fed. Reg. 55,780 (Dep't of Commerce Aug. 30, 2002) (final admin. review) 10

Ball Bearings and Parts Thereof From Japan; Amended Final Results of Antidumping Duty Administrative Review, 67 Fed. Reg. 63,608 (Dep't of Commerce Oct. 15, 2002) 13

INTERNATIONAL AUTHORITIES

Action by the Dispute Settlement Body, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DW322/15 (Jan. 30, 2007) 18

Cited Authorities

Page

Agreement on Reasonable Period of Time, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007) 19

Constitution of the Panel Established at the Request of Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/9 (Apr. 19, 2005) 17

Dispute Settlement Body, Minutes of the Meeting, WT/DSB/M/226 (Mar. 26, 2007) 19

Notification of an Appeal by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/12 (Oct. 11, 2006) 18

Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006) 18

Request for Consultations by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004) 17, 18

Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 (Mar. 8, 2002) 25

United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) 18

Petitioners NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN-Driveshaft, Inc., and NTN-BCA Corporation, (collectively "NTN") respectfully pray that this Honorable Court issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The judgment of the Court of Appeals is reported at 481 F. 3d 1355. App. A. The order of the Court of Appeals denying the petition for rehearing is unreported but listed at 2007 U.S. App. LEXIS 11681. App. C.

The judgment of the Court of International Trade is reported at 346 F. Supp. 2d. 1312. App B.

The final determination of the U.S. Department of Commerce is reported at 67 Fed. Reg. 55,780 (Aug. 30, 2002), App. D, *as amended* 67 Fed. Reg. 63,608 (Oct. 15, 2002), App. E.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 2007. App. A. On May 3, 2007, the Court of Appeals entered an order denying NTN's timely petition for a rehearing. App. C. On July 31, 2007, the Chief Justice granted NTN's request for an extension of time to file a petition for a writ of certiorari to and including August 31, 2007. On August 23, 207, the Chief Justice granted NTN's second request for an extension of time to file its petition to and including September 30, 2007. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Zeroing

The Tariff Act of 1930, as amended, provides, in relevant part:

If –

> (1) the administering authority determines that a class or kind of

> foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that –
>
> (A) an industry in the United States –
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

19 U.S.C. § 1673.

The Act, as amended, also provides:

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate

> export prices and constructed export prices of such exporter or producer.

19 U.S.C. § 1677(35)(A)-(B).

Additionally, the Tariff Act of 1930, as amended, provides:

> In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.

19 U.S.C. § 1677b(a).

2. Facts Otherwise Available

The Tariff Act of 1930, as amended, provides, in relevant part:

> **(a) In general**
>
> If –
>
> > (1) necessary information is not available on the record, or
> >
> > (2) an interested party or any other person –
> >
> > > (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
> > >
> > > (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
> > >
> > > (C) significantly impedes a proceeding under this subtitle, or

> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,
>
> the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a).

(b) Adverse inferences

If the administering authority or the commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority of the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

> (1) the petition,
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.
>
> 19 U.S.C. § 1677e(b).

(d) Deficient submissions

If the administering authority of the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

> (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or
>
> (2) such response is not submitted within the applicable time limits,

Then the administering authority or the Commission (as the case may be) may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses.

19 U.S.C. § 1677m(d).

(e) Use of certain information

In reaching a determination under section 1671b, 1671d, 1673b, 1673d, 1675, or 1675b of this title the administering authority and the commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if—

> (1) the information is submitted by the deadline established for its submission,
>
> (2) the information can be verified,
>
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

STATEMENT OF THE CASE

This case presents two significant issues:

(1) whether the Court of Appeals for the Federal Circuit must remand a case to the Department of Commerce ("Commerce") when the United States has, during the course of litigation, asserted that it has changed its policies in conformance with an adverse decision from the World Trade Organization ("WTO") and the original agency practice was specifically listed as a non-conforming practice in the WTO decision. Without a remand to Commerce to conform its practice to the United States' newly-adopted position, the Federal Circuit will have nullified the U.S.'s decision to implement the WTO determination as to this case; and

(2) whether the Federal Circuit's failure to remand a case to the Department of Commerce following Commerce's deviation from the statutory scheme regarding the use of "facts otherwise available" and an adverse inference in antidumping duty calculations should be allowed. Without a remand to Commerce and a directive to properly follow the statute, the Federal Circuit will have sanctioned Commerce's disregard of the law.

Regarding the first issue, *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10, and n.10 (1974) ("*Food Store Employees Union*"), requires a federal court to remand an agency decision when, during the course of litigation, the agency announced a change in practice from that used in its original decision. *Food Store Employees Union* holds that, in such circumstance, it is for the agency, in the first instance, to determine how its change affects the litigants. In this case, Commerce's final determination was the subject of a dispute settlement proceeding before the World Trade Organization. As a result of the WTO Appellate Body decision, the United States announced its intention to change its practice; this change in practice will dramatically effect the amount of antidumping duties Petitioners will have to pay – indeed, it will reduce them to zero. The Federal Circuit's refusal to order a remand effectively undercuts Commerce's decision to change its policy; violates the United States' treaty obligations and the statutory scheme that Congress established to implement those obligations; and is in conflict with *Food Store Employees Union* and the application of that decision by the United States Court of Appeals for the District of Columbia Circuit.

Regarding the second issue, Commerce is bound by governing statute when determining the antidumping duty rates. That statute dictates the circumstances under which Commerce may use "facts otherwise available" and an adverse inference when selecting among facts otherwise available. In this instance, Commerce ignored the statutory

scheme and, consequently, applied facts otherwise available with an adverse inference in a punitive manner. The Federal Circuit's failure to remand this case with a directive that Commerce follow the statutory scheme condones Commerce's deviation from law.

A. Background on Antidumping Proceedings

The Petitioners, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-Bower Corporation (collectively "NTN"), are Japanese producers and United States producers and importers of various kinds of antifriction bearings and related products.

In 1987 and at the request of a domestic producer of antifriction bearings, the United States Department of Commerce ("Commerce") and the United States International Trade Commission ("Commission") instituted an antidumping investigation of antifriction bearings produced in various countries, including Japan, and imported into the United States. In an antidumping investigation, the Commission examines whether or not an industry in the United States is materially injured, or threatened with material injury, by reason of imports of merchandise that are the subject of the petition. 19 U.S.C. § 1673(2). Simultaneously, Commerce investigates whether or not merchandise that is the subject of the petition is being, or is likely to be, sold in the United States at less than its fair value. 19 U.S.C. § 1673(1). If the final determinations of both agencies are affirmative, Commerce imposes upon the merchandise, through the issuance of an antidumping duty order, an antidumping duty equal to the amount by which the "normal value," the statutorily-adjusted price of the product in Japan, exceeds the statutorily-adjusted price of the product in the United States. 19 U.S.C. § 1673.

During the anniversary month of the first 12-month period following the publication of the antidumping duty order, an interested party may request a review and recalculation of the antidumping duty that Commerce imposed on that party during the investigation. 19 U.S.C. § 1675(a). These annual reviews may continue for the life of the order.

The United States maintains a "retroactive" system of assessing antidumping duties. That is, when merchandise is imported into the United States,[1] the importer pays to U.S. Customs and Border Protection ("Customs") any estimated regular customs duties that apply plus a deposit of estimated antidumping duties. This deposit is based on the final weighted-average margin rates from Commerce's most recently-completed period of review. Then, for each annual review, Commerce examines imports that occurred in the immediately preceding year to calculate the final antidumping duty that the importer must pay on imports. As a result of both the administrative and subsequent judicial review, this final weighted average margin rate may be higher or lower than the estimated, and deposited, rate.

Commerce finalizes the net duty due by ordering Customs to "liquidate" the entries. This liquidation assesses the final antidumping duties due at rates that are either higher or lower than the deposited rates, depending on the final results of administrative or judicial review. Once Customs liquidates the entries, the importer may no longer challenge Commerce's calculation of antidumping duties.[2]

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[1] Each shipment, and the filing of documents with Customs related to each shipment, is referred to as an "entry."

[2] "[L]iquidation renders moot any pending court challenge to the underlying agency determination regarding those entries, for the statutory scheme does not authorize this court to order a reliquidation of entries once they are liquidated in accordance with

(Cont'd)

In the present case, both agencies made affirmative determinations in response to the petition involving antifriction bearings from Japan. Consequently, Commerce issued an antidumping duty order on antifriction bearings from various countries, including Japan, on May 15, 1989.[3] Since the imposition of the order, NTN has requested that Commerce conduct annual administrative reviews of the order with respect to the imports and sales of each company. This case results from the twelfth such annual review,[4] covering shipments imported during the period May 1, 2000 to April 30, 2001.[5] Liquidation on these entries has been suspended pursuant to a preliminary injunction issued by the Court of International Trade. At the end of all litigation in this case, however, the injunction will be lifted and Customs will begin to liquidate the entries.

B. Commerce's "Zeroing" Practice

In an antidumping duty investigation and in annual reviews, Commerce compares sales of bearings in the United States with sales of comparable bearings in Japan.

(Cont'd)

> either an outstanding AD or CVD order, or the final results of an administrative review of such order."

Chr. Bjelland Seafoods A/S et al. v. United States, 19 C.I.T. 35, 51 (Ct. Int'l Trade 1995) (citations omitted).

[3] The antidumping order originally covered three kinds of antifriction bearings: (1) ball bearings; (2) cylindrical roller bearings; and (3) spherical plain bearings. Pursuant to the first "sunset" review of the order, the Commerce Department revoked the order on cylindrical roller bearings and spherical plain bearings from Japan.

[4] In June, 2007, Commerce initiated the eighteenth annual review of the order.

[5] The final results of the review were published as *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom*, 67 Fed. Reg. 55,780 (Dep't of Commerce Aug. 30, 2002) (final admin. review). App. D.

Specifically, Commerce compares the weighted-average prices in Japan for bearings that Commerce has determined are suitably "similar" to the product sold in the United States. Commerce engages in this comparison as part of its determination of whether sales were made at "less than normal value." 19 U.S.C. § 1677f-1(d).

If the United States price is lower than the average sales price in Japan, Commerce considers this to be a dumped sale, *i.e.*, a sale at "less than normal value" and Commerce calculates a positive margin If, however, the United States price is greater than the prices charged in Japan, the products have not been dumped and Commerce computes a "negative" dumping margin. *Id.*

After the margins for individual sales transactions have been determined, the law requires that Commerce then calculate a single, weighted-average dumping margin rate for each foreign producer. To accomplish this, Commerce adds the results, *i.e.*, the antidumping margins, of the comparison for all of the individual United States sales made during the period of review and divides this by the total value of all United States sales. 19 U.S.C. § 1677(35). Logically, such a weighted average margin rate should be the mathematical sum of all margins divided by total sales. However, instead of performing this purely mathematical operation, which would give effect to both positive and negative dumping margins, Commerce sets the negative dumping margins to zero during this summation phase. In the same summation, however, the agency fully accounts for the positive margins. By this practice of "zeroing," Commerce fails to give full mathematical effect to the negative margins and fails to calculate a true weighted average, in contravention to the statute. Commerce's methodology, therefore, artificially inflates the weighted average margin rate. Zeroing can even create margins

where none should exist.[6] These are the factual circumstances that have given rise to many challenges to the practice of zeroing, both in U.S. courts by private litigants and in international tribunals by the governments of other countries.

Additionally, zeroing has long been an issue of contention between respondents and Commerce in this enduring antidumping case. In the investigation phase and in each of the annual reviews of the order, including the review at issue, Commerce engaged in the practice of zeroing to calculate the antidumping duty margins for NTN. Various parties have challenged the practice in United States courts.

In its final results of the review at issue and by using the zeroing methodology, Commerce calculated a weighted-

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[6] As an example of margin creation, assume the following two sales occurred during the period of review:

Sale A: US price = $80; normal value = $100;

Sale B: US price = $120; normal value = $100.

Sale A has a dumping margin of -$20; Sale B has a dumping margin of $20. Using Commerce's zeroing methodology, the weighted average dumping margin calculation is:

$$\frac{0 \text{ (-\$20 is set to 0)} + \$20}{\$80 + \$120} = 10\%.$$

If, however, a true, mathematical weighted-average dumping margin, *i.e.*, without resort to the zeroing methodology, were calculated, the weighted average dumping margin is:

$$\frac{-\$20 + \$20}{\$80 + \$120} = 0\%.$$

That is, the use of zeroing creates margins where they should, in fact, be zero.

average dumping margin for NTN of 9.72%.[7] NTN asserts, however, that, but for the zeroing methodology, its weighted average dumping margin rates would be less than 0.00%. In other words, the total amount of negative margins exceeded the positive margins calculated by Commerce. The effect of a zero margin is that NTN would not be required to deposit antidumping duties on its entries in the future and that it would receive a full refund of all duties deposited for the annual review at issue.

C. Commerce's Use of Adverse Facts Available

To begin the process of the annual review at issue, Commerce sent NTN a questionnaire, which requested extensive data from NTN regarding its sales of bearings subject to the antidumping duty order in both the United States and in Japan during the period May 1, 2000 to April 30, 2001. The questionnaire requested data related to the price and quantity of each sale and any adjustments thereto, as well as costs and expenses related to bearing production, shipping, sales process, as well as profit information. In all, NTN provided Commerce with millions of pieces of data related to many thousands of sales, reported in the format requested by Commerce.

As part of this process, Commerce requested information about NTN's freight expenses. Commerce requested either transaction-specific freight expenses or, if freight expenses were incurred on multiple bases, on an allocated basis, with the allocation preferably being based on at least one of the bases on which the expenses were incurred. Commerce noted that two of the common bases for incurring freight charges were weight and distance. Commerce also stated, however,

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[7] As a result of Commerce's correction of a ministerial error, NTN's margin was subsequently changed to 9.34%. *Ball Bearings and Parts Thereof From Japan; Amended Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 63,608 (Dep't of Commerce Oct. 15, 2002). App. E.

that, if a party was unable to allocate the expenses on any of the bases on which they were incurred, a party must 1) explain how the expenses were allocated; 2) explain why the expenses could not be allocated on any of the bases on which they were incurred; and 3) demonstrate that the allocation methodology used was not distortive.

NTN responded that its freight expenses were neither incurred on the same basis for all shipments nor exclusively incurred on the bases of weight or distance. NTN explained that it incurred freight expenses based on different factors, none of which were common to all shipments. These factors included charges based on daily rates related to total distance traveled plus overtime and toll fees; bulk rates; the mode of transportation; the kind of truck used; and fixed monthly rates. Therefore, NTN was unable to allocate freight expenses on any of the bases on which they were incurred. Consequently, as invited by Commerce, NTN used a different allocation methodology, *i.e.*, sales value, and 1) explained how the expenses were allocated; 2) explained why NTN could not allocate the expenses on any of the bases on which they were incurred; and 3) demonstrated that its allocation methodology was not distortive. These statements fully responded to Commerce's request for information.

After this submission, Commerce issued a supplemental questionnaire to NTN, in which Commerce asked NTN to revise its calculation of the freight expenses to allocate them on the basis on which they were incurred or, if that was impossible, explain the reasons such an allocation was not possible. Commerce also again requested that NTN demonstrate that its allocation methodology was not distortive.

Commerce, therefore, twice invited NTN to explain the reasons NTN was not able to allocate freight expenses on certain bases and, if this allocation was not possible, to use another basis for allocation. Twice NTN responded to this question by noting that NTN was not charged, and therefore

did not incur, freight expenses on the bases listed by Commerce or on any one basis that was common to all shipments and that NTN did not collect information regarding the weight of each bearing shipped in the ordinary course of its business. Twice NTN provided an explanation for its alternative allocation methodology and explained why this allocation was not distortive. Despite NTN's response, however, Commerce unlawfully rejected NTN's reported freight expense data and instead applied "facts otherwise available" with an adverse inference in place of NTN's freight data when calculating NTN's antidumping duty margins.

D. Litigation History

NTN appealed certain aspects, including the decision to use facts otherwise available with an adverse inference, of Commerce's final results to the Court of International Trade ("CIT"); Commerce's use of zeroing, however, was not among the issues challenged by NTN. Two other parties to the proceeding did, however, contest the use of zeroing before the CIT[8] and the Government and defendant-intervenor Timken U.S. Corp. responded to these arguments. The CIT upheld Commerce's use of the zeroing methodology as a reasonable interpretation of the statute; it also held that Commerce's zeroing methodology is not WTO-inconsistent. *NSK Ltd., et al. v. United States*, 346 F.2d 1312, 1322 (Ct. Int'l Trade 2004). Additionally, the CIT affirmed Commerce's use of facts otherwise available with an adverse inference, as applied to the calculation of adjustments related to NTN's freight charges. *Id.* at 1340-44.

NTN then appealed Commerce's application of adverse facts available to the Court of Appeals for the Federal Circuit. NTN's appeal was consolidated with that of NSK. Simultaneously before the Federal Circuit were appeals contesting various aspects of Commerce's final determinations

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[8] Asahi Seiko Co., Ltd. and NSK Corp. and NSK Bearings Europe, Ltd. challenged the practice.

in the eleventh and thirteenth reviews of the same antidumping duty order at issue in this case. In each of the eleventh, twelfth, and thirteenth reviews, at least one party challenged Commerce's zeroing methodology.

In 2005, based on a motion by NSK, the CAFC granted a motion to stay the appeals of the eleventh and twelfth reviews, pending the outcome of the thirteenth review on the grounds that all three appeals involved the issue of zeroing and that a decision in the thirteenth review would resolve the issue for the other reviews. On January 11, 2006, the CAFC issued a decision without opinion in the case involving the thirteenth review of the order, affirming the decision of the lower court. *NSK Ltd. et al. v. United States*, 162 F. App'x 982, 2006 U.S. App. LEXIS 1682 (Fed. Cir. 2006).

After that decision, parties to this case (the twelfth review) filed a status report advising the Court as to how the parties believed the case should proceed. NTN requested that the Court stay proceedings in this case pending a decision by the WTO Appellate Body, and any decision by the United States to implement that decision, in a case initiated by the European Communities contesting the use of zeroing. In that case, the WTO Panel had decided that the use of zeroing in antidumping investigations was inconsistent with the WTO agreements. The CAFC, however, denied NTN's request. On March 7, 2007, the CAFC affirmed the CIT's decision regarding the application of facts otherwise available to NTN's freight calculations. *NSK Ltd. et al. v. United States*, 481 F.3d 1355 (Fed. Cir. 2007). App. A.

Additionally, after a decision by the WTO in favor of Japan's argument that the use of zeroing in this review was contrary to the U.S.'s WTO obligations, *see infra* at E, on April 23, 2007, after the United States indicated that it would comply with this decision, NTN filed a petition with the Federal Circuit for a panel rehearing and to stay

or extend the time to issue the mandate, arguing that the issuance of the WTO Appellate Body report on January 9, 2007, and the U.S.'s announcement that it intended to implement that decision, constituted events significant enough to warrant a panel rehearing. App. H. The Federal Circuit, however, denied this petition on May 3, 2007. *NSK Ltd. et al. v. United States*, 2007 U.S. App. LEXIS 11681 (Fed. Cir. 2007). App. C.

Finally, currently before this Court is a petition for a writ of certiorari filed jointly by NTN and Koyo Seiko Co. and Koyo Corporation of U.S.A., another Japanese manufacturer of antifriction bearings. This petition also challenges Commerce's practice of zeroing, as used in the eleventh administrative review of the antidumping duty order at issue in this case. A decision on that petition is pending.

E. Parallel Proceedings and Commerce's Intervening Change in Policy

Meanwhile, the Government of Japan was pursuing parallel proceedings before the WTO regarding the United States' use of zeroing and, in particular, its use in this, the twelfth review, of the antidumping order on antifriction bearings. On November 24, 2004, during the course of litigation in this case, the Government of Japan requested consultations with the Government of the United States pursuant to the rules of the World Trade Organization ("WTO"), opening Japan's challenge to the use of zeroing. Request for Consultations by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004). On February 28, 2005, the WTO established a panel to hear the dispute. Constitution of the Panel Established at the Request of Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/9 (Apr. 19, 2005). As part of its case, Japan challenged Commerce's use of the zeroing methodology in antidumping investigations and in annual reviews of antidumping duty orders as a general matter

(the "as such" challenge). Request for Consultations by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/1 (Nov. 29, 2004). Japan also challenged Commerce's implementation of that practice in sixteen specific antidumping investigations and antidumping reviews (the "as applied" challenge). *Id.* As noted, one of the specific challenges was the review at issue in this appeal. *Id.*

On September 20, 2006, the WTO Panel issued its report. Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006). The Panel rejected Japan's claims that Commerce's use of zeroing in annual administrative reviews violated the WTO Antidumping Agreement.[9] On October 11, 2006, Japan sought review of the Panel's findings and conclusions by the WTO Appellate Body. Notification of an Appeal by Japan, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/12 (Oct. 11, 2006). On January 9, 2007, the Appellate Body released its report, reversing the Panel's decision and finding that the United States acted inconsistently with the WTO Antidumping Agreement by maintaining zeroing procedures in annual administrative reviews. Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007).

On January 23, 2007, the Dispute Settlement Body ("DSB") of the WTO adopted the Appellate Body report. *See* Action by the Dispute Settlement Body, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DW322/15 (Jan. 30, 2007). The Dispute Settlement Body noted that "The Panel report should be read in conjunction with the Appellate Body report." *Id.* At the next meeting of the DSB, on February 20, 2007, the United States announced "it intended to comply in this dispute with its

[9] The Panel, however, upheld Japan's claim that the Department of Commerce's use of zeroing in average-to-average comparisons in investigations was inconsistent with the WTO Antidumping Agreement.

WTO obligations and would be considering carefully how to do so." *See* Dispute Settlement Body, Minutes of the Meeting, WT/DSB/M/226, ¶ 34 (Mar. 26, 2007). App. F. On May 8, 2007, the United States and Japan mutually agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB shall be 11 months; this period will expire on December 24, 2007. Agreement on Reasonable Period of Time, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/20 (May 8, 2007). App. G.

It is likely, therefore, that the United States will not make a decision as to how to implement the WTO Appellate Body decision until the end of this year. Currently, however, NTN faces diametrically opposed decisions on the zeroing issue that result in dramatically different weighted-average dumping margins for the company. Yet, the United States has now announced that it will change the methodology used in its decision. If this Court does not grant this petition, Customs will begin to liquidate the entries at issue and Commerce will not have the opportunity to carry out its implementation decision on these entries – the same entries for which the WTO examined the weighted-average margin calculation methodology used and held it to be contrary to the WTO Antidumping Agreement. In that event, NTN will be required to pay antidumping duties that have been determined to be violative of the United States' international obligations.

REASONS FOR GRANTING THE PETITION

First, the Federal Circuit's refusal to remand the calculation of antidumping duties to the Department of Commerce, after Commerce announced a change in its calculation methodology, is in direct conflict with this Court's decision in *NLRB v. Food Store Employees Union*, 417 U.S. 1 (1974), and in the manner in which the U.S. Court of Appeals for the District of Columbia Circuit has implemented that decision. In *Food Store Employees*

Union, this Court explained that a reviewing court should remand a case to an administrative agency following an agency change in practice to allow the agency to determine whether implementing its new practice in that case will "best effectuate the policies underlying the agency's governing act." *Id.*, 417 U.S. at 10, n.10.

Second, the refusal to remand has deprived Commerce of the opportunity to implement its change in practice in a case in which Commerce has already stated its intention to implement this practice so as to conform to the United States' international obligations. In *Food Store Employees Union*, this Court recognized that the administering agency, and not the courts, should determine the application of an intervening change in agency policy. The statutory scheme set out in the Uruguay Round Agreements Act[10] provides that the United States Trade Representative, together with the Department of Commerce, determines whether or not to implement a decision of the WTO. The Federal Circuit's refusal to remand this case, even after the United States has stated its intention to implement, undermines the intent of the underlying statute.

Third, the Federal Circuit's decision conflicts with the explicit language of the statute controlling the use of "facts otherwise available" and the use of adverse inferences in an antidumping case by condoning Commerce's rejection of NTN's reported freight expenses. The federal courts are the only gatekeepers ensuring that Commerce follows the governing statute. The Federal Circuit has erroneously sanctioned Commerce's punitive rejection of NTN's effort to cooperate to the best of the company's ability, and this Court is the only remaining venue with the authority to require that Commerce adhere to the statute.

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[10] Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809.

1. The Federal Circuit's Refusal to Remand Conflicts with the Decisions of the D.C. Circuit Remanding Agency Determinations After a Change in Policy

The Federal Circuit's refusal to remand this case in the wake of Commerce's change in practice is in direct contravention to the precedent set by this Court in *NLRB v. Food Store Employees Union*. In response to a decision by the World Trade Organization that the use of zeroing by the United States when calculating antidumping duties is contrary to the agreements establishing the WTO, the United States has stated its intention to implement that decision. In other words, the U.S. has agreed that it will no longer "zero" negative margins in weighted-average-to-transaction calculations in administrative reviews of antidumping duty orders. This constitutes a distinct and dramatic change in practice from Commerce's practice in the review at issue and in the eleven preceding reviews of this order and, indeed, in Commerce's methodology in *any* antidumping case that the agency has ever administered. Here, as in *Food Store Employees Union*, the agency that made the initial decision has determined to change its practice. Here, as in *Food Store Employees Union*, Congress has invested an agency, and not the courts, with the broad discretion to effectuate the policies set out in the statute. And, here, as in *Food Store Employees Union*, "[t]he integrity of the administrative process demands no less than that the [agency], not its legal representative, exercise the discretionary judgment which Congress has entrusted to it." *Food Store Employees Union*, 417 U.S. at 9.

In *Food Store Employees Union*, this Court reversed a court of appeals decision that amended a National Labor Relations Board ("NLRB") order to include an award of litigation expenses. *Food Store Employees Union*, 417 U.S. at 11. The NLRB had originally issued an order excluding such expenses from its awards, but during the pendency

of the litigation it abandoned its policy against awards of litigation expenses. This Court held that the court of appeals had improperly exercised its discretion in amending the NLRB order on its own, and found that is was the NLRB that should first have the opportunity to clarify inconsistencies in its decisions.

The same considerations apply in this case. On this issue, however, the Federal Circuit appears to have abandoned this Court's reasoning as set forth in *Food Store Employees Union*. The Federal Circuit has not so much as cited *Food Store Employees Union* in any case it has decided in its 25-year history. And, when the Federal Circuit has looked at the intervening change in policy issue, it has been only at the request of the agency at issue. In those circumstances, the Federal Circuit has, in fact, remanded, and found that it is a reviewing court's obligation to do so. In *SKF USA, Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), the court said:

> Where there is no step one *Chevron* issue, we believe a remand to the agency is required, absent the most unusual circumstances verging on bad faith. Under *Chevron*, agencies are entitled to formulate policy and make rules 'to fill any gap left, implicitly or explicitly, by Congress.' *Chevron*, 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231, 39 L. Ed. 2d 270, 94 S. Ct. 1055 (1974)). Furthermore, an agency must be allowed to assess 'the wisdom of its policy on a continuing basis.' *Id.* at 864. Under the *Chevron* regime, agency discretion to reconsider policies does not end once the agency action is appealed.

SKF USA, 254 F.3d at 1030.

Apparently, however, the Federal Circuit has chosen to follow this reasoning exclusively when it is the agency requesting the remand. In cases where the other party requests a remand, the issue has simply been avoided.

Unlike the Federal Circuit, the holdings of the District of Columbia Circuit on this very issue reflect a proper application of *Food Store Employees Union*, an application arguably rejected by the Federal Circuit. In *Williston Basin Interstate Pipeline Company v. FERC* ("*Williston Basin*"), the D.C. Circuit remanded a determination to the Federal Energy Regulatory Commission ("FERC") because the agency announced a change in policy. 165 F.3d 54, 62-63 (D.C. Cir. 1999). During the pendency of the *Williston Basin* litigation, the FERC changed its policy for evaluating the rate of return on common equity to weight short-term data more heavily. *Id.* at 61-62. The D.C. Circuit held that the case had to be remanded to the FERC in order for the agency to determine whether the appellant's rate of return on common equity should be recalculated consistent with the new policy. *Id.* at 62-63. The D.C. Circuit applied similar reasoning in remanding an agency decision in *Panhandle Eastern Pipe Line Co. v. FERC*, 890 F.2d 435 (D.C.Cir.1989).

2. The Federal Circuit's Refusal to Remand Undermines the Executive Branch's Decision to Implement the WTO Decision in this Case

Here, even more forcefully than in *Food Store Employees Union*, the principle that the agency should, in the first instance, decide the application of its change in policy to an outstanding case, applies. In this instance, the twelfth review of the antidumping duty order on antifriction bearings was one of the specific measures challenged by Japan in its case before the WTO. Commerce has announced that it will comply with the WTO's decision. There has been, in essence, a change in practice in this very case, as opposed to in a separate matter, as in *Food Store Employees Union*. That Commerce has *already* stated that it will implement the decision underlines the need for a remand even more forcefully. The Federal Circuit's refusal to remand this case has thwarted

Commerce's decision to change its practice as applied to this case.

Additionally, as this Court stated:

> Appellate courts ordinarily apply the law in effect at the time of the appellate decision. However, a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.

Food Store Employees Union, 417 U.S. at 10, n. 10 (citation omitted). As the Federal Circuit itself has stated, "'[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another.'" *Zenith Electronics Corporation v. United States*, 77 F.3d 426, 430 (Fed. Cir. 1996) (quoting *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (citation omitted)). Moreover, "'[t]hese tenets extend to their limits when Commerce interprets the antidumping laws, for it is the 'master' of those laws, and its interpretations are 'worthy of considerable deference.'" *Zenith Electronics*, 77 F.3d at 430 (citing *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993)). It is *because* the administering agency is most familiar with the policies of the statutes it administers and how best to effectuate them that a reviewing court should remand a case after an intervening change in policy by that agency.

Moreover, the Federal Circuit's refusal to remand this case disrupts the statutory scheme set by Congress in which the Commerce Department, in consultation with the United States Trade Representative, determines whether and how the United States will implement decisions of the WTO. *See* 19 U.S.C. §§ 3533(g) and 3538(b). The Federal Circuit explicitly recognized this in a previous decision upholding Commerce's use of zeroing:

> Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.

Corus Staal BV v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) (citing 19 U.S.C. §§ 3533(f) and (g), 3538). The decision to implement an adverse WTO decision, then, is the prerogative of the USTR and, in this case, Commerce. The United States has already announced that it will implement the WTO decision prohibiting zeroing as used by the U.S. in administrative reviews and, in particular, in this administrative review. All that remains is the details of the U.S.'s implementation, which, by agreement between the U.S. and Japan and per the provisions of the dispute settlement process of the WTO, will be revealed on or before December 24, 2007.

Most importantly, however, there is not only one statutory methodology for implementing a WTO decision to which Commerce must adhere in every case. In a prior proceeding before the WTO, the United States explained to the WTO that "Commerce would need to decide what to do with respect to entries [i.e., prior unliquidated entries] that took place prior to the date of revocation." Second Written Submission of the United States, *United States-Section 129(c)(1) of the Uruguay Round Agreements Act* ¶ 19, WT/DS221 (Mar. 8, 2002)[11] App. I. The United States further argued that the agency, i.e., Commerce, has the

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[11] *Available at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file327_6455.pdf.* Last accessed September 26, 2006.

authority to determine "how to administer the law in separate segments of the proceeding with respect to those entries," that judicial review of the results of those proceedings is available, and that there are no limitations on "Commerce's obligation to implement the results of any such judicial proceedings." *Id.* ¶ 20, App. I. These arguments clearly demonstrate that the United States believes that Commerce has the authority to decide how to implement the zeroing decision in regard to prior unliquidated entries and that the courts have the authority to remand cases involving prior unliquidated entries.

3. The Federal Circuit's Refusal to Remand Condones Commerce's Erroneous Application of "Facts Otherwise Available" with an Adverse Inference

The Federal Circuit's failure to remand this case condoned Commerce's deviation from the statutorily-mandated circumstances under which the agency may use "facts otherwise available" with an adverse inference. Commerce is bound by the statute governing the manner in which it may use facts otherwise available and an inference adverse to the interests of a party when selecting among the facts otherwise available. Any deviation from, or failure to adhere to, the statute is a violation of federal law that cannot be allowed to go unchecked. Additionally, Commerce's failure to follow the law, and the Federal Circuit's decision to sanction Commerce's actions, render the statute meaningless. If Commerce is allowed to ignore the statutory requirements, at its whim, for the limited circumstances under which it can impose facts otherwise available and the use of adverse inferences, the statutes governing antidumping proceedings will be stripped of the ability to provide guidance to the parties in antidumping proceedings. Clarity and consistency must be fundamental characteristics of federal law. *See e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 537 (1994) (Thomas, J., concurring)

("[A]n inconsistent approach to statutory interpretation robs the law of the 'clarity of its command and the certainty of its application.'" (citation omitted)).

The relevant statute, 19 U.S.C. § 1677e(a), provides that Commerce may resort to facts available if necessary information is not available on the record; or if an interested party or any other person (a) withholds information that has been requested by Commerce; (b) fails to provide such information by the deadlines for submission or in the form and manner requested; (c) significantly impedes a proceeding; or (d) provides such information but the information cannot be verified by Commerce. None of these conditions were present, given NTN's response to Commerce's original and supplemental questionnaires.

Additionally, even if any of the criteria for the use of facts available had been met, section 1677e(a) provides that Commerce shall use facts available subject to section 1677m(d). Section 1677m(d) provides that if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the submitting person of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency, bearing in mind the time limits for completing the administrative review. If that party then submits additional information in response to the deficiency and if Commerce finds that that information is not satisfactory, then Commerce may disregard all or part of the original and subsequent responses, subject to section 1677m(e). Section 1677m(e) provides that, in reaching the final results of an administrative review, Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by Commerce if

(1) the information is submitted by the deadline established for its submission,

(2) the information can be verified,

(3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by Commerce, and

(5) the information can be used without undue difficulties.

Also, if Commerce finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the agency, Commerce may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. 19 U.S.C. § 1677e(b). Commerce's regulations provide that if the agency finds "that an interested party 'has failed to cooperate by not acting to the best of its ability to comply with a request for information,' [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 C.F.R. § 351.308(a).

Consequently, Commerce acted in violation of both statutes when it decided to use facts otherwise available because NTN's actions did not rise to threshold necessary under the statute for their use. NTN's submissions met the statutory conditions for *requiring* Commerce to consider its information. Commerce's decision failed to follow the statutory scheme and the use of facts otherwise available should not have been allowed by the Federal Circuit.

After NTN was invited by Commerce to allocate its freight expenses on a basis other than weight, NTN chose to accept Commerce's invitation because NTN does not commonly incur freight expenses based on weight and does not collect weight data in the ordinary course of business. NTN provided Commerce with an allocation based on sales

value, the *only* criteria common to all freight expenses, in a timely manner. Commerce, knowing full well that NTN does not ordinarily incur freight expense based upon weight and does not track such information, ignored the statutory scheme that checks the unbridled and undisciplined use of facts available. NTN responded directly, clearly, and in a timely manner to Commerce's questionnaire. The company provided usable information and cooperated with Commerce at every junction, as it has in every past and continuing review of this antidumping order and other orders on different bearings. NTN acted to the best of its ability and Commerce's refusal to accept its freight allocation was simply punitive and in conflict with the limited circumstances set forth in 19 U.S.C. § 1677e(a) and (b) and § 1677m(e) for the use of facts available. *See Nucor Corp. v. United States*, 414 F.2d 1331, 1336 (Fed. Cir. 2005) ("[T]he purpose of antidumping and countervailing duty laws is remedial, not punitive or retaliatory[.]" (citation omitted)). Commerce also incorrectly declined to consider the information that NTN had provided when calculating freight expense, in direct violation of 19 U.S.C. § 1677m(d) despite a *second* response by NTN to Commerce's allegation that NTN's initial explanation was deficient pursuant to 19 U.S.C. § 1677e(b).

Furthermore, even if Commerce had properly resorted to "facts otherwise available," Commerce erred by applying an adverse inference when selecting among the "facts otherwise available." An adverse inference may only be used when a party has failed to act to the best of its ability when cooperating with Commerce when complying with a request for information. 19 U.S.C. § 1677e(b). Requiring a party to provide information that simply does not exist is illogical. As the Federal Circuit correctly determined in a previous case, the failure to provide unavailable information does not, and cannot, constitute the failure of a party to act to the best of its ability. *Nippon Steel Corp. v. United States*,

337 F.3d 1373, 1382 (Fed. Cir. 2003). Commerce's repeated demands that NTN allocate freight expense on the basis of weight, while knowing full well that NTN did not collect such information, had no logical basis. NTN, at Commerce's invitation, allocated freight expense on the basis of sales value and provided the underlying data to Commerce. When asked by Commerce to demonstrate that an allocation based on sales value was less distortive than an allocation based upon weight, NTN responded to the best of its ability to Commerce's demands by explaining that sales value was the only constant variable. NTN did not have the ability to *show* that it was less distortive because NTN did not have the weight data. Commerce, apparently dissatisfied with NTN's collection of data in the ordinary course of business, decided to use an adverse inference for purely punitive reasons.

This Court is the only court remaining to police Commerce's violations of the governing statute. Commerce's punitive application of facts available with an adverse inference contravenes the strictures set out by Congress on Commerce's ability to arbitrarily reject information submitted by respondents in a timely manner and to the best of their ability. The failure to remand this case to Commerce with a corresponding directive to follow the statutory scheme creates the impression that Commerce is not bound by federal law, but is simply a law unto itself. Commerce must be required to adhere to governing statutes when making its determinations to ensure that the force of law remains in effect. When parties to an antidumping proceeding rely on federal statutes for legal guidance, they should have the certainty that these statutes, in fact, will be followed by the administering agency. If this certainty does not exist, the statutes have no meaning.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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